

November 3rd, 2009



FEMA

BY HAND-DELIVERY

Clerk of the Board
Civilian Board of Contract Appeals
1800 M Street, N.W.
6th Floor
Washington, D.C. 20036

DOCKET NUMBER: CBCA-1776-FEMA

Dear Sir or Madam:

Please find attached the Response of Federal Emergency Management Agency (FEMA) to the arbitration request submitted by the St Bernard Parish Sheriff's Department and filed as CBCA-1776-FEMA. Submitted with the Response is a binder(s) of exhibits.

Please add the following Office of Chief Counsel contacts for all notices and correspondence to FEMA related to the arbitration hearing: Linda M. Davis, Associate Chief Counsel – Program Law Division, 202-646-3327 or lindam.davis@dhs.gov; and Kim A. Hazel, Senior Counsel – Program Law Division, 202-646-4501 or kim.hazel@dhs.gov.

Very truly yours,

Chad T. Clifford
General Attorney
Office of Chief Counsel
DHS/Federal Emergency Management Agency
500 C St., S.W.
Washington, D.C. 20472

November 30, 2009



FEMA

BY HAND-DELIVERY

Clerk of the Board
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Very truly yours,

A handwritten signature in black ink, appearing to read "Chad T. Clifford".

Chad T. Clifford
General Attorney
Office of Chief Counsel
DHS/Federal Emergency Management Agency
500 C St., S.W.
Washington, D.C. 20472

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**ST. BERNARD PARISH SHERIFF'S DEPARTMENT
LABOR AND EQUIPMENT COSTS, PROJECT WORKSHEET ("PW") 16989
FEMA-1603-DR-LA
DOCKET # CBCA 1776-FEMA**

**RESPONSE OF THE FEDERAL EMERGENCY MANAGEMENT AGENCY TO
ARBITRATION REQUEST OF ST. BERNARD PARISH SHERIFF'S DEPARTMENT**

On October 29, 2009, the Federal Emergency Management Agency ("FEMA") received the request of St Bernard Parish Sheriff's Department¹ ("Applicant") to arbitrate FEMA's denial of funding for PW 16989. See Exhibit 1. Project Worksheet (PW) 16989 represents FEMA's funding of \$720,621 for reimbursement of the Applicant's emergency work-related labor and equipment costs for the time period of August 2006 through December 2006. PW 16989 also represents FEMA's denial of \$3,416,961 for the Applicant's ineligible labor and equipment costs incurred during this time period. The following constitutes FEMA's response to the Applicant's arbitration request.

JURISDICTION

The Applicant invokes jurisdiction pursuant to The American Recovery and Reinvestment Act of 2009, P.L. 111-5, which establishes the option for arbitration under the Public Assistance ("PA") program for award determinations related to Hurricanes Katrina and Rita under major disaster declarations DR-1603-LA, DR-1604-MS, DR-1605-AL, DR-1606-TX and DR-1607-LA. See 44 C.F.R. § 206.209.

¹ Arbitration Request refers the St. Bernard Parish Sheriff's Office; however, Applicant's Request for Public Assistance ("RPA") identifies the agency as St. Bernard Parish Sheriff's Department.

The Applicant meets regulatory guidelines for filing an arbitration request as outlined in 44 CFR §206.209 as follows:

- The arbitration request for \$3,461,961 exceeds the \$500,000 arbitration project threshold.
- The Applicant appealed FEMA's denial of costs documented in PW 16989 on February 8, 2008.
- FEMA denied the Applicant's first appeal on April 29, 2008.
- The Applicant filed a second appeal on July 23, 2008.
- The Governor's Office of Homeland Security and Emergency Preparedness (GOHSEP) forwarded the Applicant's second appeal to FEMA on September 26, 2008.
- FEMA denied the Applicant's second appeal on April 6, 2009.
- The Applicant filed a Request for Arbitration on October 29, 2009.

SUMMARY OF FEMA'S POSITION

FEMA contends that PW 16989 is an appropriate and reasonable estimate of eligible costs for the Applicant's overtime, force account labor, and equipment costs associated with emergency work performed from August 1 through December 31, 2006. Further, FEMA properly rejected \$3,416,961 claimed by the Applicant for ineligible labor and equipment costs during this time period, as such costs are not attributable to eligible emergency work directly related to Hurricane Katrina.

BACKGROUND

The Stafford Act

FEMA, a component agency of the United States Department of Homeland Security, is responsible for administering and coordinating the Federal governmental response to

Presidential-declared disasters pursuant to the Stafford Act.² See 42 U.S.C. §§ 5121, *et seq.* The Stafford Act is triggered when, at the request of the governor of a state, the President declares an affected area to be a “major disaster.” See 42 U.S.C. § 5170; 44 C.F.R. §§ 206.36, 206.38. Once a disaster is declared, the President determines the types of discretionary assistance that may be made available in the declared area. See 42 U.S.C. § 5170.

The Declaration

On September 24, 2005, the President issued a major disaster declaration for the State of Louisiana as a result of Hurricane Rita pursuant to his authority under the Stafford Act. See 42 U.S.C. § 5121. This declaration authorized all categories of Public Assistance, including permanent restoration of damaged facilities. See Exhibit 3. Restoration of damaged facilities includes funding for either repair or replacement of eligible facilities on the basis of the design of such facilities as they existed immediately prior to a major disaster declaration. See 42 U.S.C. § 5172; 44 C.F.R. § 206.226. The President’s declaration included St. Bernard’s Parish.

Public Assistance

Under the Stafford Act, FEMA may provide, *inter alia*, Public Assistance. The Stafford Act states that FEMA “may make contributions” for the repair, restoration, and replacement of damaged facilities. See 42 U.S.C. § 5172. Public Assistance allows FEMA, in its discretion, to provide disaster assistance to states, local governments, and certain non-profit organizations if FEMA determines that the applicant, facility, and work meet eligibility requirements. See 44 C.F.R. §§ 206.200-.206. PA funding can be provided in the form of grants for the state or

² The Stafford Act authorizes FEMA to promulgate rules and regulations necessary to carry out the provisions of the Stafford Act. See 42 U.S.C. § 5164.

local government's own recovery efforts, or FEMA may fund direct federal assistance through which a federal agency performs the recovery work. See 44 C.F.R. §§ 206.203, 206.208.

The State of Louisiana is the grantee for all FEMA Public Assistance delivered in the State. See 44 C.F.R. § 206.201(e). The St Bernard Parish Sheriff's Department is a subgrantee of the State. See 44 C.F.R. § 206.201(l)

Project Worksheets

Project worksheets (PWs) document the estimate of disaster related damage, determine whether the damage is eligible for Public Assistance, and list, among other information, the scope and "quantitative estimate for the cost of eligible work." See 44 C.F.R. § 206.202(d). After PW completion, FEMA reviews the PW in order to make determinations on whether to approve funding for eligible work. Id. Thereafter, FEMA may make Federal disaster assistance funds available, *i.e.*, "obligate," based on the final PW. See 44 C.F.R. § 206.202(e). A PW is not a contract between FEMA and the State and/or Subgrantee to pay Federal disaster assistance and does not create any right to receive any such Federal funds. See 44 C.F.R. § 206.202(d). Rather, a PW establishes the scope of work and provides cost estimates, based upon the engineering analysis and on-site investigation, of the anticipated cost of a project. See id.; 44 C.F.R. § 206.202(e); Gardiner v. Virgin Islands Water & Power Auth., 145 F.3d 635, 644 (3rd Cir. 1998) (providing that required authorization cannot be implied for contracts in emergency situations as specific steps are required to bind the United States). If the actual cost to complete the approved scope of work described in the PW exceeds the estimate, FEMA may approve additional funding during the project closeout process.

As described, a PW is only an estimate of the cost related to the performance of eligible work. Applicants must establish and maintain accurate records of activities and expenditures related to disaster recovery work to demonstrate that actual costs incurred were for eligible work. See 44 C.F.R. § 13.20. Required documentation describes the "who, what, when, where, why, and how much," for each item of work. Public Assistance Guide, FEMA 322 (1999) at 113-114. Applicants must maintain records for three years following final payment of claims. See 44 C.F.R. § 13.42(b). The Agency has authority to disallow costs and recover funds upon a later audit or other review and determination, including when eligible costs cannot be documents or when work is determined to be ineligible. See 44 C.F.R. § 13.51.

Emergency Work

The Stafford Act specifically authorizes FEMA to provide "Essential Assistance," including reimbursement of costs for work that is necessary to meet immediate threats to life and property resulting from the major disaster. See 42 U.S.C. § 5170b. FEMA further defines "essential assistance" to include "emergency work," which is defined as that "work which must be done immediately to save lives and to protect improved property and public health and safety, or to avert or lessen the threat of a major disaster." 44 C.F.R. § 206.201(b).³ FEMA's authority to reimburse emergency work is further defined in 44 C.F.R. § 206.225. Emergency work is divided into two categories: Debris Removal and Emergency Protective Measures. See Public Assistance Guide, FEMA 322 (1999) at 44-53.

Eligible emergency work must (1) eliminate or lessen immediate threats to lives, public health or safety; or (2) eliminate or lessen immediate threats of significant additional damage to improved public or private property through measures which are cost effective. 44 C.F.R. § 206.225(a)(3).

³ The Stafford Act authorizes FEMA to promulgate rules and regulations necessary to carry out the provisions of the Stafford Act. See 42 U.S.C. § 5164.

“Immediate threat” is defined as the threat of additional damage or destruction from an event that could reasonably be expected to occur within five years. 44 C.F.R. § 206.221(c). FEMA is also authorized to require certification from local, State, and/or Federal officials of the existence of an immediate threat, including identification and evaluation of the threat and recommendations of the emergency work necessary to cope with the threat, prior to funding. 44 C.F.R. § 206.225(a)(2).

Appeals and Arbitration

The Stafford Act authorizes appeals of PA assistance decisions. See 42 U.S.C. § 5189(a). There are two levels of appeal — the first to the Regional Administrator, the second to the Assistant Administrator for the Disaster Assistance Directorate. See 44 C.F.R. § 206.206(b). The American Recovery and Reinvestment Act of 2009, P.L. 111-5, establishes a new option for arbitration under the PA program for award determinations related to Hurricanes Katrina and Rita under major disaster declarations DR-1603-LA, DR-1604-MS, DR-1605-AL, DR-1606-TX, and DR-1607-LA. See 44 C.F.R. § 206.209. A decision of a majority of this Panel shall constitute the final decision, binding on all parties, and is not subject to judicial review, except as permitted by 9 U.S.C. § 10. See 44 C.F.R. § 206.209(k)(3).

St. Bernard Sheriff’s Department Emergency Work: Labor and Equipment

Hurricane Katrina caused widespread devastation and destruction to the infrastructure in St Bernard Parish. Prolonged loss of electric service and damage to traffic signals and signage created a need for the Sheriff’s Department to control traffic and increase patrols of devastated neighborhoods and commercial areas. The lack of housing in the area after the disaster resulted

in the loss of Sheriff's Department personnel, which required the remaining personnel and temporary employees hired after the disaster to work extended periods of overtime.

In response to the devastating conditions following Hurricane Katrina, FEMA obligated 14 PWs for more nearly \$19 million for the St. Bernard Sheriff's Department based on an estimate of labor and equipment costs related to the performance of eligible emergency work from August 28, 2005, the landfall of Hurricane Katrina, to July 31, 2006. See Exhibit 3. Catastrophic conditions in the immediate days, weeks, and months following the disaster prevented the Applicant from reasonably providing FEMA with documentation that is typically required prior to preparation of a PW. FEMA responded to the Applicant's immediate and extraordinary need by advancing funding with the understanding that actual documentation would be required to reconcile the advanced funding with documented eligible work. See 44 C.F.R. § 206.205(b)(1) and §§ 13.50-.51; see also Exhibit 4 at 21-28.

The Applicant's Case Management File (CMF) notes a pattern of regular ongoing discussions with the Applicant and GOHSEP representatives regarding documentation requirements for these initial PWs. See Exhibit 5. The CMF also notes the Applicant's difficulties with obtaining payment from GOHSEP related to State auditors' questions and documentation concerns. Id. at 7-8, 12, 15, 19, and 24. Further, each of the initial PWs indicate the Applicant's responsibility to maintain auditable records and reinforces GOHSEP's responsibility, as Grantee, to ensure that submitted costs conform to all applicable PA Program guidelines prior to payment.⁴ See Exhibits 3(a-n).

⁴The Grantee has a specific responsibility to "[e]nsure payment requests from subgrantees apply to funds expended on the eligible scope of work and comply with grant conditions." Exhibit 4 at 12.

The Applicant incurred additional labor and equipment usage costs from August 1, 2006, through December 31, 2006, and requested an additional PW to cover these costs. See Exhibit 5 at 16-25. Given the persistent documentation problems noted in the CMF related to the initial funding advanced within the first year of the disaster, FEMA worked with the Applicant and GOHSEP to gather information required to support eligibility prior to preparing the new PW for work completed a year and more after the disaster. Id. Despite nearly one additional year of efforts at coordination with the Applicant, the documentation gathered indicated that only a small fraction of the claimed costs related to the performance of eligible emergency protective measures. Convinced that all attempts to obtain additional documentation from the Applicant had been exhausted, FEMA prepared PW 16989 to obligate \$720,621 for eligible work, and deny \$3,461,961 for ineligible work.

PROCEDURAL HISTORY

First Appeal

On March 13, 2008, the first-level appeal was filed with FEMA regarding PW 16989, requesting \$3,406,961 for labor and equipment expenses deemed ineligible by FEMA. See Exhibit 6. The Applicant's appeal stated all costs claimed in PW 16989 are eligible because they relate to the protection of life, safety and welfare of the citizens of St Bernard Parish. FEMA denied the Applicant's first appeal on April 29, 2008, concluding that PW 16989 correctly limited funding to documented eligible emergency work. See Exhibit 7. Many of the denied costs appeared to represent normal Sheriff's Department operating expenses, which were not directly related to the disaster. FEMA also noted that the Applicant's appeal did not provide any additional documentation or description of activities performed to support a finding that the requested

scope of work represented eligible emergency protective measures as required by regulation.

See 44 C.F.R. § 206.206(a).

Second Appeal

In its second appeal filed September 30, 2008, the Applicant disagreed with FEMA that activities performed by the Sheriff's department constituted normal operating expenses. See Exhibit 8.

The Applicant's appeal re-stated that all costs claimed in PW 16989 are eligible because they relate to the protection of life, safety and welfare of the citizens of St Bernard Parish. The Applicant's representatives met with FEMA Headquarters representatives in an oral hearing on January 6, 2009, to discuss the second appeal. FEMA considered all information provided by the Applicant and determined that PW 16989 properly defined the eligible scope of work and cost. As such, FEMA denied the Applicant's second level appeal in a letter dated April 6, 2009. See Exhibit 9.

Request for Arbitration

The Applicant now files this request for arbitration seeking \$3,416,961 under 44 C.F.R. § 206.209, via letter dated October 27, 2009. See Exhibit 1. The Applicant argues in its request for arbitration that labor and equipment costs denied in PW 16989 are eligible for reimbursement as emergency work. On October 29, 2009, GOSHEP submitted a letter in support of the Applicant's request. See Exhibit 10.

STANDARD OF REVIEW

While the ARRA provides for a limited waiver of immunity, it is silent as to the standard of review to be used in the arbitrations. However, the text of the ARRA clearly **contemplates an "arbitrary and capricious" -- and not a *de novo* -- standard of review.** First, the provision

“the President shall establish an arbitration panel *under* the Federal Emergency Management Agency public assistance program,” (emphasis added) illustrates two clear concepts: (1) the Executive Branch is responsible for establishing the arbitration panel and defining its authority; and (2) the authority is “under” the FEMA PA program. It does not follow from that phrase that Congress intended a *de novo* review.

Second, the express purpose of the arbitration panel is “to expedite the recovery efforts from Hurricanes Katrina and Rita within the Gulf Coast Region.” Again, the plain text does not contemplate a *de novo* review that will duplicate previous time-intensive efforts to determine the amount of hurricane damage to facilities that is eligible for a grant under FEMA’s PA program.

Third, the ARRA grants the arbitration panel “*sufficient authority* regarding the award or denial of disputed public assistance applications for covered hurricane damage under section 403, 406, or 407 of [the Stafford Act].” (emphasis added). The phrase “sufficient authority” indicates that this Panel’s authority is not absolute. Congress could not have intended the arbitration panel to have review authority that exceeds that of any Federal court. Indeed, this was settled by the Supreme Court in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985), where the Court noted that “[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum.”⁵ By implementing the appropriate “arbitrary and capricious” standard, the arbitration panel has sufficient review authority.

⁵ An arbitration under the ARRA is a unique circumstance resulting from special legislation specific to a particular set of entities that mandates FEMA, as the entity charged with implementing the Stafford Act, participate. It is therefore akin to an arbitration where one party is required to pursue a statutory claim. See, e.g., Cole v. Burns Int’l Sec. Servs., 105 F.3d 1465, 1468-69, 1476 (D.C. Cir. 1997) (comparing arbitration under a collective bargaining

Finally, the ARRA tasked the arbitration panel to make determinations regarding the “award or denial” of the PA application for “covered hurricane damage.” Again, the ARRA provides for review of the prior administrative proceedings – the “award or denial” – not for an independent evaluation. The plain meaning of the phrase “covered hurricane damage” is that damage for which FEMA reimbursement is authorized by the Stafford Act. The ARRA plainly does not expand FEMA’s authority under sections 403, 406 and 407 to provide Federal funding for hurricane damages and an arbitration panel must also necessarily be guided by, and limited to, the scope of sections 403, 406 and 407.

The arbitration panel must also consider “general principles respecting the proper allocation of judicial authority to review agency orders” when making its decision regarding the standard of review. Florida Power & Light Co. v. Lorion, 470 U.S. 729, 737 (1985). It is well-settled that review of Agency action, where Congress has not designated a standard of review, defaults to the arbitrary and capricious standard articulated in the Administrative Procedure Act (APA), 5 U.S.C. § 706:

In cases where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed, [the Supreme Court] has held that consideration must be confined to the administrative record and that no de novo proceeding may be held.

United States v. Carlo Bianchi & Co., 373 U.S. 709, 715 (1963) (citing Tagg Bros. & Moorhead v. United States, 280 U.S. 420 (1930); Nat’l Broad. Co. v. United States, 319 U.S. 190, 227(1943)). Accordingly, courts consistently hold that, in the absence of a statutorily-defined type of review, the reviewing body must seek guidance in the APA and only “hold unlawful or set aside agency action, findings and conclusions found to be . . . arbitrary, capricious, an abuse

agreement where nearly unlimited deference is paid with an arbitration of a statutory claim where such deference is “not appropriate”).

of discretion, or otherwise not in accordance with law.’ ” GTE South, Inc. v. Morrison, 1997 U.S. Dist. LEXIS 23871 (E.D. VA) (citing 5 U.S.C. § 706(2)(A)); see Clark v. Alexander, 85 F.3d 146, 151-52 (4th Cir. 1996); Guaranty Sav. & Loan Ass’n v. Fed. Home Loan Bank Bd., 794 F.2d 1339, 1342 (8th Cir. 1986) (proper to look to the APA and apply the arbitrary and capricious standard where statute did not define the type of review); see also Cabinet Mountains Wilderness v. Peterson, 222 U.S. App. D.C. 228, 685 F.2d 678 (D.C. Cir. 1982); Am. Canoe Ass’n v. United States EPA, 46 F. Supp. 2d 473, 476 (E.D. Va. 1999).

The APA standard for review of FEMA’s public assistance decisions has been explained by the 9th Circuit when reviewing a decision by FEMA to deobligate certain costs from a PA grant:

Under the APA, we may set aside agency action only if it was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” The standard is a narrow one, and the reviewing court may not substitute its judgment for that of the agency. However, the agency must articulate a rational connection between the facts found and the conclusions made. Also, we must give substantial deference to an agency’s interpretation of its own regulations.

Pub. Util. Dist. No. 1 of Snohomish County, Washington v. Fed. Emergency Mgmt. Agency, 371 F.3d 701, 706 (9th Cir. 2004) (internal citations omitted). See also Graham v. Federal Emergency Management Agency, 149 F.3d 997, 1007 (9th Cir. 1998) (applying APA and arbitrary and capricious standard where decision is not discretionary).

DISCUSSION AND ANALYSIS

A major disaster is by definition an event for which Federal assistance is necessary “to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.” 42 U.S.C. § 5122(2). Per the Stafford Act, the Agency may provide Essential Assistance, including

reimbursement of costs for work “essential to meeting immediate threats to life and property resulting from a major disaster.” FEMA further defines “essential assistance” to include “emergency work,” which is defined as “work which must be done immediately to save lives and to protect improved property and public health and safety, or to avert or lessen the threat of a major disaster.” 44 C.F.R. § 206.201(b). Eligible emergency work must (1) eliminate or lessen immediate threats to lives, public health or safety; or (2) eliminate or lessen immediate threats of significant additional damage to improved public or private property through measures which are cost effective. Id. § 206.225(a)(3).

Funding Obligated in PW 16989 is Reasonable and in Accordance with Law

PW 16989 is an appropriate and reasonable estimate of eligible costs for the Applicant’s overtime, force account labor, and equipment costs associated with eligible emergency work performed from August 1 through December 31, 2006. FEMA properly obligated PW 16989 for \$720,621 for documented eligible emergency work performed in response to Hurricane Katrina. Further, FEMA appropriately rejected \$3,416,961 claimed by the Applicant for ineligible emergency work that was not performed in direct response to Hurricane Katrina.

PW 16989 Correctly Obligates Funding For Documented Eligible Emergency Work

In preparing PW 16989, FEMA identified \$720,621 in eligible emergency work costs supported by the Applicant’s documentation for work performed from August 1, 2006, through December 31, 2006. See Exhibit 11. Eligible emergency protective measures noted in PW 16989 include eligible labor and equipment costs for providing security and traffic control in the disaster area. See Public Assistance Guide, FEMA 322 (1999) at 48. FEMA reimbursed the Applicant for eligible emergency work it performed in direct response to Hurricane Katrina,

including: active patrol of largely unpopulated areas of the Parish that were without electricity, and performance of traffic duties in response to widespread damaged or missing street signs and traffic signals. See Exhibit 11 at 2. This patrol and traffic control work is eligible because it was required to protect lives and property as a direct result of the disaster. See 44 C.F.R. § 206.225(a)(1). Hurricane Katrina directly damaged buildings and infrastructure, creating a need to secure the disaster area and alert the public of dangers associated with disaster-caused hazards. See Public Assistance Guide, FEMA 322 (1999) at 48.

PW 16989 Appropriately Denies Funding for Ineligible Work

In preparing PW 16989, FEMA identified \$3,461,961 associated with ineligible or otherwise undocumented work from August 1 through December 31, 2006. Ineligible work noted in PW 16989 includes labor and equipment costs for administrative support functions and increased operational costs related to the Department's basic pre-disaster mission to "ensure the public order and safety." Exhibit 1 at 11. Eligible emergency work must be performed in direct response to the disaster. See 44 C.F.R. § 206.201(b); see also Public Assistance Guide, FEMA 322 (1999) at 23. While the Applicant may well have incurred additional costs related its public order and safety mission, such costs are not eligible unless such work is directly related to the disaster.

The Applicant claims that all labor and equipment costs denied in PW 16989 relate to work required as a direct result of the disaster, being necessary to protect lives and property in the post-disaster environment. See Exhibit 1 at 7. The Applicant's narrative also describes how changed socio-economic conditions in the post-Katrina environment put a strain on law

enforcement resources. Id. at 7-11.⁶ However, the Applicant failed to identify any specific emergency protective measures related to hazards caused directly by the disaster for personnel in the following divisions: Administration, Field Operations Bureau Administration, Corrections, CIB/SID, Community Relations, Maintenance, Criminal Records, and Court Services. See Id. Furthermore, any costs associated with the Sheriff's Department law enforcement mission due to changed socio-economic conditions that may have been an indirect effect of the post-disaster environment are not eligible for Public Assistance - only emergency work needed as a direct result of the disaster may be eligible. See Public Assistance Guide, FEMA 322 (1999) at 23. For example, the Applicant claims that Sheriff's Department work in response to increased post-disaster gang-crime related activity, increased drug use, and increased incidence of domestic violence, is eligible emergency work. See Exhibit 1 at 8. However, Hurricane Katrina did not directly increase the presence of gangs in the Parish, nor did the Hurricane directly cause increased drug use, and similarly, the disaster did not directly cause an increased incidence of domestic violence. Thus, work performed in response to such conditions is not eligible as directly disaster related work. Additionally, PW 16989 denied funding for Field Operations Bureau deputies and other Sheriff's Department personnel due to insufficient documentation. See Exhibit 11 at 3.

FEMA maintains, with one exception⁷, that the work described in the Applicant's Request for Arbitration is ineligible because it is not required as a direct result of the disaster. See 44 C.F.R.

⁶ The Applicant cites multiple, indirect socio-economic impacts that strained law enforcement resources, including: decreased Sheriff Department staff; increased gang-related activity; and increased domestic violence and drug use. See Exhibit 1 at 7-11.

⁷ Costs associated with increased patrols necessary to secure the disaster area are eligible (See Public Assistance Guide, FEMA 322 (1999) at 48). However, FEMA maintains that the Applicant has not provided documentation to support the claim that CIB/SID officers conducted patrol duty to secure the disaster area. This issue is addressed in greater detail below.

§ 206.201(b); see also Public Assistance Guide, FEMA 322 (1999) at 23. Although a major disaster may prompt an applicant to alter standard operating procedures and adapt to post-disaster conditions to continue day-to-day operations, this does not mean that all costs related to such changes are eligible for reimbursement under the PA Program, because only work performed in direct response to the disaster is eligible. The stated mission of the St. Bernard Sheriff's Department is to "ensure the public order and safety." Exhibit 1 at 11. However, the Applicant's costs resulting from internal operational changes made to execute the agency's day-to-day mission after a disaster should not be confused with eligible costs related to work performed to protect lives and property in direct response to the disaster. If internal operational changes resulted in certain Sheriff's Department employees performing work in direct response to the disaster, such work may be eligible. To the contrary, other work performed in response to the Sheriff's Department mission to generally provide safety and public order is not eligible, because such work is already required of the Sheriff Department and cannot be directly attributed to the disaster. Furthermore, the ineligibility of increased operating costs similar to those claimed by the Applicant is established further by appeals precedent. Between September 1997, and August 2005, FEMA denied at least 13 second level appeals involving increased operating expenses.⁸

FEMA's denial of the Applicant's request to fund increased operating costs was reasonable, appropriate, and consistent with applicable statute, regulation, policy, and guidance.

⁸ The appeal determinations are posted online to provide FEMA analysis on the issue to the public. Refer to the subheading "Increased Operating Costs" at the following URL: www.fema.gov/appeals/

Applicant's Documentation Fails to Justify Eligibility

The Applicant's Request for Arbitration only further highlights the Applicant's failure to provide insufficient documentation, which led to the denial of funding for undocumented ineligible work in PW 16989. Non-specific department lineup sheets submitted with the Applicant's Request do not help clarify eligibility of any work completed between August 1, 2006, and December 31, 2006. See Applicant's Exhibit 1. As detailed previously, the Applicant must establish and maintain records to demonstrate the costs incurred for eligible work. See 44 C.F.R. § 13.20; see also Public Assistance Guide, FEMA 322 (1999) at 113-114, and 44 C.F.R. § 206.202(b)(4). Because the Applicant has failed to provide adequate documentation, the Applicant has also failed in its responsibility to identify eligible work. See 44 C.F.R. § 206.202(d).

Specifically, the Applicant claims that CIB/SID officers supplemented patrol duties to secure the disaster area. See Exhibit 1 at 9. However, while patrols necessary to secure the disaster area may be an eligible activity, the Applicant failed to provide documentation to support the claim that costs for CIB/SID officers are patrol-related. Patrol log books for each CIB/SID officer from the date of work performed listing the patrol vehicle, hours on patrol, and areas of patrol would be sufficient to demonstrate eligibility of the claimed work. FEMA requested documentation to support claims of eligible work on numerous occasions, including patrol log books. See Exhibit 5 at 17. However, the Applicant did not provide the requested documentation. FEMA acted reasonably and in accordance with applicable law and policy in denying the Applicant's request for work that it has not documented or justified as being eligible disaster related work.

FEMA Provided Funds for Emergency Work from August 2005 to July 2006 to the Applicant Based on Estimates

In the catastrophic conditions immediately following the disaster, FEMA recognized that the Applicant may not reasonably be able to provide adequate documentation to demonstrate eligible work when FEMA prepared and obligated the initial PWs. FEMA responded to the Applicant's immediate and extraordinary need by advancing funds to the Applicant with the understanding that the Applicant would later provide actual documentation to demonstrate that it used the funds to perform eligible work. See 44 C.F.R. § 206.205(b)(1) and §§ 13.50-.51; see also Exhibit 4 at 21-28. Additionally, while FEMA may have prepared initial PWs absent adequate documentation in order to foster disaster recovery, each of the initial PWs indicate the Applicant's responsibility to maintain auditable records and reinforces GOHSEP's responsibility, as Grantee, to ensure that submitted costs conform to all applicable PA Program guidelines prior to payment.⁹ See Exhibits 3(a-n). Also, the Applicant's case file reflects that the Applicant was aware of the FEMA requirement and its responsibility to document how it used FEMA funds. See Exhibit 5. Thus, FEMA consistently maintained that adequate documentation would be required to verify eligible costs; otherwise the Agency may disallow costs and recover funds if the work would later be determined ineligible. See 44 C.F.R. § 13.51.

The Applicant now claims that FEMA had approved the "exact same labor and equipment costs" for the St. Bernard Sheriff's Department prior to August 2006, which FEMA denied in PW 16989. See Exhibit 1 at 11. However, the Applicant fails to recognize that the underlying requirements for adequate documentation did not change. Furthermore, the base requirement that eligible work must be directly related to the disaster did not change. What did change was

⁹The Grantee has a specific responsibility to "[e]nsure payment requests from subgrantees apply to funds expended on the eligible scope of work and comply with grant conditions." Exhibit 4 at 12.

that FEMA made a decision to no longer advance the Applicant funding for undocumented eligible costs, as continued advancement of funding for undocumented work would only lead to a larger amount of disallowed and recovered funds upon closeout, should the Applicant be unable to adequately document eligible work.

Furthermore, for those PWs obligated for the Applicant's emergency work performed prior to August 2006, FEMA indicated that it would analyze the scope of work at closeout to determine whether estimated eligible costs have been adequately documented. Accordingly, each PW contains the following statement:

FEMA will adjust funding on all large projects based on the actual eligible costs incurred. A final inspection and program review will determine and validate the appropriate eligibility and associated costs incurred." See Exhibits 3(a) at 16, 3(b-c) at 9, 3(d) at 8, 3(e) at 6, 3(f-g) at 5, 3(h-i) at 8, 3(j) at 9, 3(k-l) at 8, and 3(m-n) at 6. See Exhibit 3.

This is a standard comment that reflects large project closeout procedures. See 44 C.F.R. § 206.205(b)(1) and §§ 13.50-.51; see also Exhibit 4 at 21-28.

If obligated funding exceeds the actual costs that the Applicant incurs for the defined scope of work, FEMA will adjust the final PW per the standard closeout process to reflect only the actual costs associated with the eligible scope of disaster related work. Therefore, FEMA respectfully requests that the Panel disregard the Applicant's references to PWs for work the Applicant performed prior to August 2006, because FEMA has not rendered a final determination on the eligibility of submitted cost documentation for such prior PWs.

CONCLUSION AND RECOMMENDATION

FEMA asserts that \$720,621 obligated in PW 16989 is an appropriate and reasonable estimate of eligible costs for the Applicant's overtime, force account labor, and equipment costs associated with emergency work performed from August 1 through December 31, 2006. Furthermore, FEMA properly rejected \$3,416,961 claimed by the Applicant for ineligible labor and equipment costs during this time period, as such costs are not attributable to eligible emergency work directly related to Hurricane Katrina. FEMA acted in accordance with all applicable law, regulation, and policy. As such, FEMA respectfully recommends this Panel find in favor of Agency, and deny the Applicant's request for \$3,416,961 in Public Assistance funding for ineligible emergency work in PW 16989.

Respectfully submitted on this 30th day of November 2009 by,

A handwritten signature in black ink, appearing to read 'C.T. Clifford', written over a horizontal line.

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DOCKET #CBCA 1776-FEMA

LIST OF EXHIBITS

Exhibit 1 – Applicant’s Request for Arbitration, received October 29, 2009

Exhibit 2 – Major Disaster Declaration, DR-1603-LA

Exhibit 3 – Prior PWs for Applicant Labor and Equipment

Exhibit 4 – FEMA Standard Operating Procedure 95970.14

Exhibit 5 – Case Management File Entries

Exhibit 6 – Applicant’s First Appeal, February 8, 2008

Exhibit 7 – FEMA First Appeal Decision, April 29, 2008

Exhibit 8 – Applicant’s Second Appeal, July 23, 2008

Exhibit 9 – FEMA Second Appeal Decision, April 6, 2009

Exhibit 10 – GOHSEP Response to Applicant’s Request for Arbitration, November 10, 2009

Exhibit 11 – PW 16989